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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re the Marriage of TARA FRECH-
WUNSTELL and AARON WUNSTELL.

TARA FRECH-WUNSTELL,

Respondent,

v.

AARON WUNSTELL,

Appellant.

F076246

(Super. Ct. No. 16CEFL02193)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. D. Tyler Tharpe, Judge.

Aaron Wunstell, in pro. per., for Appellant.

No appearance for Respondent.

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* Before Franson, Acting P.J., Peña, J. and Smith, J.

Appellant Aaron Wunstell is an inmate representing himself in this marriage dissolution proceeding. The issues he presents in this appeal have been narrowed to matters involving the ownership of the family home, its contents and his wedding ring.

Item 4.*m.*, of the judgment addressed the division of property by stating, “There are no community assets or debts.” This statement shows Aaron’s community property rights to the house and its contents “have not been previously adjudicated” as that phrase is used in Family Code section 2556. The statute gives the family court continuing jurisdiction to adjudicate rights to real and personal property omitted from the judgment. As a result, Aaron may pursue his community property rights using the procedure set forth in Family Code section 2556. Therefore, we conclude reversal of the judgment is not necessary and Aaron’s remedy is to file a postjudgment motion or an order to show cause requesting the family court to adjudicate his property claims.

We therefore affirm the July 2017 judgment.¹

FACTS AND PROCEEDINGS

Aaron and Tara were married in April 2001 and separated in April 2013. Their daughter was born in 2006, and their sons were born in 2010 and 2013. In January 2010, they acquired a house on East Byrd Avenue in Fresno.

Tara alleges that in June 2015, Aaron forced his way into the house through the front door and was verbally abusive and, also that month, broke into the house while she was at work. Tara alleges that in October 2015, Aaron began stalking and harassing her online and through the phone. She states that in November 2015, Aaron was arrested outside the house for violating a restraining order.

¹ The family court has the continuing jurisdiction to address Aaron’s claims relating to property omitted from the judgment, and our affirmance of the judgment in no way prejudices Aaron’s ability to pursue relief under Family Code section 2556.

Petition for Dissolution

In April 2016, Tara filed a petition for dissolution of marriage. She represented herself in the proceeding. In July 2016, Tara filed a separate property declaration that listed one asset. Under the heading for real estate, Tara listed the house on East Byrd Avenue, stated the debt against it was \$139,566, and did not estimate its gross fair market value or the amount of equity. Tara made no entries under the declaration's headings for other types of property, such as household furniture, furnishings and appliances; jewelry; vehicles; savings or checking accounts; or other assets.

In August 2016, Tara filed a financial statement (simplified) that included entries for her gross monthly income, job-related expenses, and the monthly mortgage payment. Tara stated she had been self-employed as a hairstylist since August 2014. In an attachment describing the arrangement for custody and visitation of the children, Tara stated that, due to Aaron's incarceration and drug abuse, the children lived full time with her.

In November 2016, Tara filed a first amended petition for dissolution of marriage. In the section of the petition addressing separate property, Tara checked the box stating, "There are no such assets or debts that I know of to be confirmed by the court." The next section addressed community property. Tara (1) checked the box for a determination of rights to community property assets and debts and (2) listed the house on East Byrd Avenue. This represented a change from her July 2016 declaration, which described the house as her *separate* property.

In January 2017, the family court allowed Tara to amend her petition. Tara's second amended petition stated she did not know of any community or quasi-community assets to be divided by the court and asked the court to confirm other assets as her separate property, checking the box for "*Property Declaration (form FL-160)*." Tara completed a Judicial Council of California form FL-160 (rev. Jul. 1, 2016) by checking the box for "SEPARATE PROPERTY DECLARATION." Under the first item, real

estate, Tara listed the house on East Byrd Avenue, stated it was acquired on January 29, 2010, estimated its gross fair market value at \$208,990, and listed the debt against it as \$137,899. Under the other 17 items listed on the form, Tara handwrote “none.” Thus, Tara reverted to her original position of characterizing the house as her separate property and was no longer asking the court to make a determination of community property rights to the house.

Tara’s separate property declaration included as attachments a copy of (1) a grant deed and (2) an interspousal transfer deed. The grant deed was recorded by the Fresno County Recorder on January 26, 2010, as document number 2010-0009489 and stated that Citibank granted to “Tara L. Frech-Wunstell, a married woman as her sole and separate property,” certain real property. The interspousal transfer deed executed by Aaron was recorded by the Fresno County Recorder on January 26, 2010, as document number 2010-0009488. It stated that Aaron, “spouse of the grantee, hereby GRANT(S) to Tara L. Frech-Wunstell, a married woman, as her sole and separate property the real property” described as Lot 72 of Tract No. 5374 in the City of Fresno. This description and the assessor’s parcel number on both deeds refer to the house located on East Byrd Avenue.

Restraining Order

On June 5, 2017, Tara requested a temporary restraining order against Aaron, using the Judicial Council of California mandatory forms drafted for that purpose. The family court issued the temporary restraining order and set a hearing for later that month. Tara’s request alleged Aaron broke into her home through a window the previous day at 3:30 a.m. and the police came.² She stated Aaron “is under the influence of drugs, acts erratically, and is a danger to the children’s safety due to his drug use and actions.” She

² The income and expense declaration Tara filed on March 1, 2017, stated Aaron was “currently incarcerated.” By June, he had been released.

also described an incident on April 17, 2013 (the date of separation) when Aaron was in the home under the influence of meth and, when she asked him to leave, he struck her in the face.

On June 29, 2017, a hearing was held on the temporary restraining order. Both parties appeared and represented themselves. The court noted Aaron was in custody, criminal charges were pending, and he might be released in early August. The court stated the existing restraining order would remain in effect, granted Aaron's request for a continuance, and scheduled a hearing for August 17, 2017.

On August 17, 2017, the family court held a hearing and received testimony from both parties, who had appeared without attorneys. The court took testimony from both parties, noted Aaron was in custody at the Fresno County Jail on a parole violation, found Tara had met her burden of proof, and granted her request for a restraining order, which was to remain in effect for five years. The restraining order was attached to the minute order from the hearing.

Judgment and Appeal

On July 5, 2017 (while the temporary restraining order was in place), the family court entered a judgment of dissolution that terminated the parties' marital status as of that date. In August 2017, Aaron filed a notice of appeal from the judgment.

DISCUSSION

I. SCOPE OF APPEAL

Aaron's opening brief requested this court to (1) grant him correspondence privileges with his three children; (2) equitably divide the proceeds from the sale of the house acquired during the marriage; (3) equitably divide the contents of the house, or the monetary value of those contents; (4) award him his wedding ring; and (5) reserve the question of his right to spousal support to a later date. Tara did not file a respondent's brief. During oral argument, Aaron withdrew his points relating to correspondence with

his children and spousal support.³ Consequently, this opinion addresses only the property issues.

II. COMMUNITY PROPERTY

A. Aaron's Contentions

Aaron's opening brief requests an equitable distribution of all community property, including all interior contents of the house on East Byrd Avenue and the financial gains realized from the sale of the house. Aaron asserts he contributed \$5,000 to the down payment, which he obtained as a gift from his grandmother, and Tara contributed \$4,000 to the down payment, which she borrowed from her grandmother and subsequently paid back.⁴ Aaron contends they orally agreed that he would take care of the children and she would work to support the home. He also contends the value of the house includes his "sweat equity" and \$1,200 obtained as a gift from his mother that he used in building a patio cover and improving the landscaping in front of the house.⁵

³ Item 4.*l.*, of the July 2017 judgment explicitly states that spousal support, as it relates to either Aaron or Tara, is reserved for future determination. Thus, the judgment provided what Aaron had requested in his opening brief.

⁴ Aaron did not state whether the repayment to Tara's grandmother and the mortgage payments were made using community funds. "When community property is used to reduce the principal balance of a mortgage on one spouse's separate property, the community acquires a pro tanto interest in the property. [Citations.] This well-established principle is known as 'the Moore/Marsden rule.'" (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1421–1422.) California courts do not presume a gift when community funds are used to reduce an encumbrance on a separate asset. Instead, in such a circumstance, our courts recognize a co-ownership interest irrespective of the status of title. (*In re Marriage of Moore* (1980) 28 Cal.3d 366, 371–372, 373–374; *In re Marriage of Branco* (1996) 47 Cal.App.4th 1621, 1627.)

⁵ Family Code section 2640, which authorizes reimbursement for separate property contributions to the acquisition of community property, includes "payments for improvements" in its definition of "[c]ontributions to the acquisition of the property." (See *In re Marriage of Wolfe* (2001) 91 Cal.App.4th 962, 967; *In re Marriage of Gowdy* (1986) 178 Cal.App.3d 1228, 1234.) Aaron did not state whether the gift from his mother was made to him as his separate property, was made to the community, or was made to Tara as her separate property.

At oral argument, Aaron contended (1) Tara had committed fraud on the court, (2) he had been denied his right to meaningful access to the courts, and (3) the interspousal transfer deed he signed in January 2010 was made for purposes of obtaining financing and, by its terms, was “not a change of ownership.”

B. Judgment

Item 4.*m.*, of the July 2017 judgment addressed the division of property by checking the third box labeled “Other (*specify*)” followed by a handwritten sentence stating, “There are no community assets or debts.” Therefore, the judgment does not expressly adjudicate (1) the characterization of any assets or debts as either separate or community property and (2) the division of any asset or debt determined to be community property. (See Fam. Code, §§ 760 [community property], 770 [separate property], 2550 [division of the community estate upon dissolution of marriage].)⁶

C. Available Remedy

Occasionally, a judgment in a marriage dissolution proceeding will not provide for the division of all of the community assets and debts. The California Legislature addressed this situation by enacting Family Code section 2556 to create a procedure (other than a separate civil action) for the division of omitted community estate assets and debts. The statute provides in pertinent part:

Aaron’s mention of sweat equity appears to be a reference to the principle that community property includes the fruits of both spouses’ “expenditures of time, talent, and labor” (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850; see Fam. Code, § 760 [definition of community property].)

⁶ Family Code section 2550 states: “Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, *the court shall*, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, *divide the community estate of the parties equally*.” (Italics added.)

“In a proceeding for dissolution of marriage, ... the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding. A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment. In these cases, the court shall equally divide the omitted or unadjudicated community estate asset or liability, unless the court finds upon good cause shown that the interests of justice require an unequal division of the asset or liability.” (Fam. Code, § 2556.)

This provision grants the family court with continuing jurisdiction to adjudicate omitted (i.e., unadjudicated) community assets without the party having to first move to set aside a prior default judgment. (*In re Marriage of Huntley* (2017) 10 Cal.App.5th 1053, 1061 [wife waited two years after entry of default to bring motion under Fam. Code, § 2556].) Furthermore, relief under this section is available even though the moving party knew about the existence of the asset or debt at the time of the dissolution proceeding. (*Ibid.*)

Based on Family Code section 2556 and the case law discussing that provision, we conclude the appropriate procedure for Aaron to obtain a division of items that he contends were part of the community estate is to pursue either a postjudgment motion or an order to show cause in the family court proceeding pursuant to Family Code section 2556.

The availability of a remedy in the family court leads us to conclude Aaron has not been denied meaningful access to the courts for the purpose of determining his property interests in the proceeds from the sale of the house, the interior contents of the house, and his wedding ring. (See *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1482 [indigent prisoner who is a party to a bona fide civil action threatening his property interest may not be deprived of his right of access to the courts]; *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792.) In other words, there is no need to reverse item 4.m. of the July

2017 judgment and remand for further proceedings on the property issues because those issues can be pursued under Family Code section 2556.

As to Aaron's claim of fraud upon the court, this issue is best pursued in the first instance in the family court rather than a court of review because the family court sits as a trier of fact, which is a role rarely undertaken by an appellate court. (See Code Civ. Proc., § 909; Cal. Rules of Court, rule 8.252(b), (c); see generally, *In re Zeth S.* (2003) 31 Cal.4th 396, 405 [appellate court's authority to take evidence and make factual determinations should be exercised only in exceptional circumstances].) The claim that a judgment was entered as the result of fraud upon the court can be pursued in a motion to vacate the judgment. (E.g. *In re Marriage of Park* (1980) 27 Cal.3d 337 [trial court abused discretion in denying motion to vacate judgment of dissolution that addressed division of community assets].)

DISPOSITION

The judgment is affirmed. No costs are awarded on appeal as respondent did not appear.